FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1767

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government brief ("G. Br.") does not respond to petitioner's brief ("NSPE Br."), is pervasively erroneous, and does not withstand scrutiny. It misstates the main facts, employs fallacious logic, and ignores controlling law. Limitations of time and space prevent discussion of all the errors, fallacies and omissions in the government brief. The most significant ones are analyzed in the following sections.

I. THE GOVERNMENT BRIEF PROVES THAT THE RULE OF REASON APPLIES TO THIS CASE.

The government brief itself is a conclusive demonstration that this case cannot be decided under the procrustean *per se* rule, and must be decided under the rule of reason. As shown herein, many of the major premises and assertions in the government brief are flatly wrong, inaccurate or misleading. However, if every assertion and allegation in the government brief were accepted as correct, the government brief would simply prove that this case must be decided under the rule of reason. The government brief discusses the nature of engineering, the history of the ethical principle, its scope and operation, its economic purpose and competitive impact, and its justification. On each of these points the government brief states a different position than that stated in NSPE's brief. But if these matters are at all relevant, and warrant the Court's consideration, then the case is clearly a rule of reason case. As the Court has plainly stated, these are the elements to be considered on the evidence under the rule of reason, *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238-41 (1918); *White Motor Co.* v. *United States*, 372 U.S. 253, 261 (1963); and not subject to consideration under the *per se* rule. *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 5 (1958); see also NSPE Br. 45-60. These are also the elements the courts below expressly refused to consider and held irrelevant, and on which the district court made no findings. If this is a *per se* case all of these matters are irrelevant.

Thus, in seeking to meet NSPE's case, the government brief implicitly concedes that its basic premise is wrong. This case cannot be decided by the simple expedient of *per se*, but requires determination on the evidence under the rule of reason.

II. THE GOVERNMENT BRIEF IS INCONSISTENT WITH THE DECISIONS OF THE LOWER COURTS, AND REQUIRES REVERSAL.

Although the government brief repetitively invokes the pejorative term "price fixing"—which the record shows is not involved here, as demonstrated below—the argument which the government brief offers to sustain the judgment relies on other considerations the lower courts expressly rejected. Taking its own summary of argument, the government brief's two major points are that the NSPE principle is not justified by the nature of engineering (G. Br. 32); and that fee bidding for engineering design work is feasible and practical (G. Br. 33). The argument then proceeds to assert that: "Price competition in the offering of engineering services will not endanger the public safety. . . . There are many safeguards other than the suppression of price competition to assure high quality engineering work. . . . Moreover, there is no objective evidence that competitive bidding or price comparison by engineering clients leads to unsafely engineered structures." G. Br. 34.

The fatal defects in this argument are that, in addition to being disproved by voluminous evidence, it is directly contrary to the position taken by the lower courts, at the government's urging, and lacks any support whatever in the district court findings. See III, *infra*. Contrary to the government brief, the question before this Court is *not* whether the lower courts erred in weighing the evidence of reasonableness. The question before this Court is whether the lower courts erred in expressly refusing to weigh that evidence. This point is proved by the lower court opinions themselves.

In its first opinion the district court said: "It is undisputed that price fixing is a *per se* unreasonable restraint of trade under the Sherman Act and that in such

cases *it is not for the court to decide whether a particular price fixing activity serves an honorable or worthy end.*" 389 F. Supp. 1199, J.A. 9938. "[T]he court is convinced that the ethical prohibition against competitive bidding is *on its face* a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act. . . . The Sec. 11(c) ban on competitive bidding is in every respect a classic example of price-fixing in violation of § 1 of the Sherman Act." 389 F. Supp. 1200, J.A. 9940-41. (Emphasis added.)

In its second opinion the district court said: "Price fixing is a *per se* violation of the Sherman Act, *requiring no further inquiry into the activities' origin, history or purpose.* . . [T]he Court adheres to its previous decision holding Section 11(c) of defendant's Code of Ethics to be a *per se* violation of § 1 of the Sherman Act." 404 F. Supp. 460-61, J.A. 9988-90. (Emphasis added.)

The circuit court affirmed the conclusion of the district court on this point, saying: "The district court correctly appraised the rule before it as one that at its core 'tampered with the price structure', and as therefore *illegal without regard to claimed or possible benefits.*" 555 F.2d 984, Cert. App. A-12. (Emphasis added.)

The government's own brief in the district court on remand stated that the district court "correctly refused" to consider whether the ethical canon "serves an honorable or worthy end." See NSPE Br. 59-60.

Thus, the government, having successfully urged the lower courts to decide the case on a *per se* basis—without considering the evidence relating to reasonableness or making any findings relating to reasonableness—now urges this Court to affirm on the basis of *a priori* argument that the ethical principle is unworthy and unreasonable. Having argued and secured decisions that justification is irrelevant, the government now seeks to sustain these decisions on the basis that the ethical principle is not justified.

In sum, the decisions below do not support the government argument here; and the government argument here does not support the decisions below. This is precisely the situation presented in *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918), where the lower court judgment was reversed, and in *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610 (1977). *Fortner* was an antitrust case in which the plaintiff prevailed in the district court on a theory of *per se* violation. The findings and judgment were affirmed by the court of appeals. On review this Court held that the *per se* rule did not apply, and therefore that the judgment must be reversed. The same result is required here.

III. THE GOVERNMENT BRIEF IS PERVASIVELY INACCURATE AND MISLEADING IN ITS FACTUAL PREMISES.

A. The District Court Made No Independent Findings of Fact.

The government brief asserts, at 5, that the facts "are set forth in the District Court's initial findings, 69 of which were adopted with modifications from those proposed by the government . . . and 56 from those proposed by NSPE. . . ." The government brief then sets forth a statement of alleged "facts" based on the so-called "findings" of the District Court. In fact, however, the District Court made no independent findings, did not scrutinize the findings it adopted wholesale from the government proposals, adopted only those findings proposed by NSPE of which government counsel ap-

proved,[1] did not refer to any of the testimony of any of the numerous witnesses in this case, did not analyze or even mention most of the record, did not change a single word or punctuation mark in the judgment presented to it by the government attorneys, and, in short, essentially abdicated the adjudicatory function to the government attorneys. Even the district court opinions were virtual redactions of the government's briefs.

Of the 69 proposed government findings adopted by the district court, 61 were adopted verbatim, seven were altered only by changing a few words to provide grammatical continuity, and only one was changed in a manner which could be termed substantive—and that one change merely involved omitting one entirely conclusory sentence. Thus, the assertions in the government brief supported only by reference to purported "findings" actually rest only on contentions of government attorneys which were not independently reviewed.

This Court and other appellate courts have strongly criticized, as an abdication of the judicial function, the verbatim adoption by trial courts of findings proposed by a party. That procedure is an inadequate substitute for judicial review. See authorities cited in NSPE Br. 59 n.210.

B. The History Of The Ethical Principle Against Bidding Is Substantially Misrepresented In The Government Brief.

The government brief discusses the origin, history and development of the ethical principle in a manner that suggests it was a device to serve the engineers' economic interests, and had no relation to the public interest. This misrepresentation rests on selected statements of individuals, culled by the government from tens of thousands of documents secured from numerous sources, and on the government's unwillingness to state to this Court NSPE's position as set forth in NSPE's authorized publications.

[1] The District Court knew which of NSPE's proposed findings the government approved because it required each party to mark the other's proposed findings in blue, red, and yellow, signifying agreement, disagreement and irrelevance. See J.A. 2406-07.

The government brief begins its discussion of the ethical principle's origin by asserting that the principle derives from NSPE's "Canons of Ethics." The government brief then asserts, at 8, that it is feasible for an engineer before being initially selected to inform his client of the cost of the proposed services. No citation is given for the latter assertion. Both are contrary to the record.

Contrary to the government brief, the ethical principle at issue long antedates the formation of NSPE, and grew out of statements of ethics by many engineering organizations dating back at least to 1911. See NSPE Br. 22. The "Canons of Ethics" to which the government refers were not those of NSPE but of the Engineers' Council for Professional Development ("ECPD"), and were endorsed by NSPE prior to the time NSPE adopted its Code of Ethics in July 1964. J.A. 2534. It is the NSPE Code of Ethics which is attacked in the complaint, not ECPD's long-superseded Canons.

The government brief's assertion that it is generally possible for an engineer to state the cost of his service before consulting with the client is flatly wrong, and is contradicted by extensive testimony in the record. For example, Dr. Marlowe, Vice President of Catholic University, former Engineering School Dean, and former head of the District of Columbia Board of Registration for Professional Engineers (see J.A. 1958-69) testified that "after a part of the engineering work has been done, a little in simple cases and a lot in complex cases, then you are in a position to know what the price of a job is going to be—but not at the beginning. Not at the beginning." (J.A. 2006) James Shivler, head of a large

engineering firm (J.A. 657-79) was asked how long it takes to determine his firm's fee for a job. He testified: "I would say an average complex job of average complexity would probably take us about two weeks, including the initial meeting with the client, and then we would come back and work out our costs." (J.A. 804) Other eminent engineers testified to the same effect. Pikarsky, J.A. 58; Lawler, J.A. 375-78; Gibbs, J.A. 1280. There is no contrary evidence; the assertion in the government brief is without any support and false. There is no finding to the contrary.

The government brief implies that "Rule 50" supports the contention that an engineer can specify costs in advance of engagement and consultation with a client. "Rule 50" was apparently adopted in 1957 (J.A. 7176), and superseded in 1964, and represented part of an interpretation of the ECPD ethical canon stating that an engineer will not compete with another engineer "by underbidding." J.A. 7182. "Rule 50" stated that it was ethical for an engineer to solicit an engineering assignment by providing factual information concerning his qualifications, and that if he were asked for a proposal for a specific project he should state in detail the work he proposed to do. It also said that a statement of fees should be avoided at that point. J.A. 7182. Together with "Rule 51" which follows it immediately, "Rule 50" is clearly directed toward avoiding the evil of deceptively low fee estimates or bids which might mislead clients at an early stage. A fair reading of "Rule 50" is that when a client asks an engineer for a specific proposal the client and engineer will consult, and the engineer will secure the necessary information from the client to enable the engineer to formulate a rational concept of the project. Nothing in "Rule 50" or its context or this record suggests any other interpretation.

The government brief wrongly states, at 9, that "Rule 50" was changed in 1961 to "narrow the circumstances

in which an engineer could ethically inform a prospective client of his charges." In fact, the very document cited in the government brief plainly indicates that the former version of "Rule 50", if interpreted to permit quoting fees before the facts were known, would be inconsistent with the ethical principle (J.A. 6380); and sets forth amendments to "Rule 50" which explicitly provide that engineering firms should be initially selected on the basis of qualifications, and that *after* an initial selection has been made there should be negotiations on the project's scope and the fee. J.A. 6383. This is the precise procedure mandated by numerous United States statutes and regulations including the Brooks Act, and embodied in section 11(c) of NSPE's Code of Ethics. *See* NSPE Br. 24-27, 61-65.

The government brief states, at 10 n.10, that the NSPE Board of Ethical Review ("BER") rendered an opinion on "Rule 50" after the Rule was amended. In fact, the sequence was to the contrary. The BER opinion was issued in 1960, as its number, 60-2, indicates. J.A. 2564. The report amending "Rule 50" is dated February 9-11, 1961, and refers to BER opinion 60-2. J.A. 6379, 6380. The 1960 BER opinion corroborates the interpretation of "Rule 50" stated above. BER opinions are the authoritative statements of NSPE interpretations of ethical principles. See NSPE Br. 23 n.95. BER opinion 60-2, interpreting "Rule 50" states, in relevant part:

> Since the securing of competitive bids for professional engineering services is not in the best public interest and as such procedure frequently results in the awarding of the work to other than the best qualified engineer, the National Society of Professional Engineers does now and herein express itself as opposed to competitive bidding for professional engineering services and recommends the practice of negotiating contracts in all cases where it may be

> necessary or desirable to consider the service of more than one engineering consultant or organization. [J.A. 2564.]

Thus, in 1960 BER said that the traditional method of engineer selection by competence should be followed under "Rule 50": there should be consultation between the engineer and client prior to the statement of a fee.

The government brief proceeds to set forth, at 10, a purported revised canon which stated that an engineer would not engage in "competition on price alone." While the quotation in the government brief is taken from a document in the record, this canon has no significance in this case because it was never approved, adopted or implemented in any way by NSPE, and, indeed, was expressly *disapproved* by NSPE, as the record shows. J.A. 6244-45.

The government brief alleges, at 11, that during the period involved in this case the NSPE ethical principle applied to all work done by professional engineers. This is simply false, as the record makes plain. In 1962 the Board of Ethical Review held R&D work outside the scope of the ethical principle. J.A. 2599. The Board said: "R&D projects are more in the nature of contracts to produce an end-item or prototype rather than of the traditional services concept found in engineering." J.A. 2600. This authoritatively states NSPE's position (see F.D. 27, J.A. 9967), which remains unchanged.

The government brief, however, implies that the 1962 ruling was changed. The government brief, at 11 n.13, refers to a reconsideration of the question by BER in 1971, and quotes from a personal letter which purports to state in a few words the position of one BER member. Whatever individual members may have said to one another, the BER opinion cited states:

> The evil of competitive bidding for engineering services is that it endangers the public health, safety and welfare. When price is a factor in selecting a person or firm to design a bridge, a heating system, a dam or an electrical system and similar physical facilities the great danger is that the client will be tempted, or even required, to select the person or firm offering the lowest price. Long experience demonstrates that this kind of price competition for creative services not subject to comparison or standards is destructive of competence and care. A poor job to meet a low price thereby invariably must lead to shortcuts and careless techniques which present increased risk that the bridge may fall, the heating system explode, the dam collapse or the electrical system start fires. Moreover, inadequate engineering, resulting from competitive bidding, will result in higher life cycle costs and lack of consideration of other related factors. [J.A. 5736]

The foregoing BER statement authoritatively sets forth NSPE's policy and the underlying considerations. On the basis of these considerations, BER tentatively thought that study contracts should not be subject to competitive bidding. However, before this opinion was promulgated, the argument was presented to BER that R&D and study contracts do *not* involve the public interest considerations referred to, but involve instead undertakings to make studies of specified scope, and to design prototypes for testing, not for public use. The BER opinion was thus never issued, J.A. 2778, 5746, 5748-49, and NSPE policy that the principle against selection by fee bidding does not apply to study and R&D contracts remains unchanged. J.A. 1788-90.

The government brief asserts, at 12-13, 49-50, that NSPE revised its interpretation of "the bidding ban" in 1972 to exclude special studies and R&D, and wrongly attributes the revision to an alleged necessity to meet competition for such work. In 1972 NSPE did revise

its policy statement on "Selection Procedures for Professional Engineering Services." J.A. 2445. However, it did *not* do so for the reason stated in the government brief. The revision did not identify R&D work. Rather, it specifically confined the principle against selection by bidding to work involving design of real property structures. J.A. 2445. The change was made because this was the kind of work which involved risks to clients and the public when initial selection by bidding was employed. J.A. 5682-83; see NSPE Br. 17-18.

The sole authority the government brief cites for its contention is a paper the government brief describes, at 13, as the "principal NSPE study" on the subject. In fact, the paper is not a "NSPE study" at all, and was not prepared for NSPE. As the paper shows on its face, it was prepared by a single individual for the Committee on Federal Procurement Procedure of A-E Services (COFPAES). J.A. 5737. Whatever the merits or demerits of this paper may be, it is not attributable to NSPE, does not state NSPE policy or reasoning, and is simply another example of the government brief's highly misleading use of someone else's document swept up by the government in its nationwide discovery in this case, inserted into the record, and now cited regardless of its lack of any attribution or connection to NSPE.

C. NSPE Neither Maintains Fee Schedules Nor Fixes Prices.

Although the complaint in this case makes no reference to fee schedules, and NSPE has no fee schedule, and the District Court held that fee schedules are "not at issue in this case", J.A. 9940, the government brief persists in dragging this red herring before the Court. Since the government first raised the spurious issue of fee schedules on the eve of trial, NSPE has repeatedly offered to delete all references to fee schedules of other professional so-

cieties in any NSPE publication. These are the only fee schedules to which any NSPE publication has referred. The fee schedule-price fixing charge is a spurious issue to distract the Court from the real issue—whether the ethical principle against selection by bidding in engineering does or does not serve the public, and whether it is or is not unreasonable.

Although NSPE still declines to be baited into defending fee schedules, it is important to note that the government brief is thoroughly wrong on this subject, too. The government brief wrongly charges that NSPE enforces fee schedules, saying, at 16, that "[d]eviations from the fees set forth in state or local fee schedules violate" the NSPE Code, and, at 51 n.41, that "NSPE has required that its members adhere" to fee schedules. This charge is irrelevant, misleading and without evidentiary foundation. The misleading nature of this charge can be illustrated simply by examining the citations the government brief supplies. Footnote 41 (G. Br. 51) charges NSPE with requiring adherence to fee schedules, and cites Government Exhibit 409-D, a manual of nearly one hundred pages published not by NSPE, but by the American Society of Civil Engineers as ASCE Manual No. 45. J.A. 8358-8448. Two pages in the Manual show "Median Compensation For Basic Services Expressed As A Percentage of Construction Costs. . . ." J.A. 8386, 8387. "Median" denotes a measure of central tendency which states the midpoint of a range without defining or indicating the range. Therefore, stating a median compensation necessarily implies that this is a statement of historical data and that actual compensation was both above and below the median. Although this point might not be self-evident to lawyers, it is certainly obvious to engineers who are accustomed to mathematics in their daily work. It is absurd to speak of requiring "adherence" to a "median" schedule. This is emphasized by the manual itself which states explicitly:

> While these curves may be an appropriate basis for initiating discussions with a client, the final compensation should be determined by negotiations following detailed discussion of the scope of services and the elements of the cost of engineering. [J.A. 8388.]

Ironically, however, the government brief does not even cite the pages of ASCE Manual 45 which set forth the median fee curves. It cites *inter alia*, J.A. 8364, which states:

> It is to be understood that the data given hereinafter for engineering percentage fees, factors on payrolls, etc., are not to be considered as fixed, or maximum, or minimum, but rather as general guides to be used or not used, in the sole discretion of each individual, to assist in the negotiation of agreements between Clients and Engineers. They provide a sound basis for determining reasonable compensation for engineering services, being composites of the experienced judgment of many engineers.

See also, *e.g.*, state fee schedules at J.A. 7801, 7802, 7975, 7976, 8130, 8166, 8168, 8193-96, 8264, 8265, 7288, 7400, 7573, and 7593. Moreover, as this record shows, ASCE's publication was submitted to the Department of Justice and published with Department of Justice approval. J.A. 2303-05, 8361.

Furthermore, this Court has never held that professionals may not supply advisory fee information to prospective clients. To the contrary, in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 781 (1975), the Court stated:

> A purely advisory fee schedule issued to provide guidelines, or an exchange of price information without a showing of an actual restraint on trade, would present us with a different question . . . The record here, however, reveals a situation quite different from what would occur under a purely advisory fee schedule. Here a fixed, rigid price floor arose from respondents' activities: every lawyer who responded

> to petitioners' inquiries adhered to the fee schedule, and no lawyer asked for additional information in order to set an individualized fee.

In any event, the "fee schedule" and "price fixing" charge is a red herring which merely provides the opportunity for the government brief to attack the NSPE principle by epithets rather than analysis. The NSPE principle has never required adherence to any fee schedules, and even had that been the case it is not defended in that respect.

This is corroborated by the records of this Court. On February 25, 1975, months before the decision in *Goldfarb* v. *Virginia State Bar*, NSPE filed in this Court its Reply to Motion to Affirm in No. 74-872. In that pleading NSPE said, at 2:

> NSPE has no fee schedule, has no intention or wish to have a fee schedule, and has no desire either to attack or defend fee schedules. That position has been made plain to Appellee from the earliest days of this litigation. Some other engineering societies—like some bar associations—have fee schedules. Whatever merit or lack of merit such fee schedules may have is an issue to be decided in other cases.

That has been the consistent position of NSPE throughout this litigation, both before and after *Goldfarb*, and that continues to be NSPE's position before this Court.

D. NSPE Exhorts But Does Not Enforce The Ethical Principle.

The government brief argues, at 17-22, that NSPE "enforces" the ethical principle. Most of the argument relates to the selection of an engineering firm to redesign the Tri-State Airport at Huntington, West Virginia following a crash in which all members of a college basketball team were killed. J.A. 156. The government brief refers to this as "[a]n example" of NSPE action.

It is no such thing. The hearing relating to this matter was unique, was the first hearing ever held relating to section 11(c), and is the only hearing NSPE has ever held relating to that section. J.A. 162; NSPE Br. 23-24. To refer to this matter as "an example" is highly misleading.

More basically, the account presented in the government brief is inaccurate. The initial selection of an engineer in that instance was *not* by the traditional method, as stated in the government brief, at 19, but involved a comparison of proposed fees by a number of firms. J.A. 2419. The firm initially selected did *not* quote a fee but gave only "very rough estimates of overall engineering costs." J.A. 5618. The publicized figure of some $500,000 was *not* the fee quoted by the firm initially selected, but was based on a reporter's incorrect assumptions, and on a guess. J.A. 2421, 2422, 2426. Thus, the alleged "reduction" in engineering cost is entirely illusory and unsupported by the record.

The investigation of this matter was requested by the West Virginia engineering society, which believed that political influence was involved in the selection of the engineer, and that kickbacks to a local engineer were also involved. J.A. 5713. The investigation corroborated that a condition for selection of an engineering firm apparently was agreement to pay one percent of construction costs (more than 20 percent of the engineering fee) to a local engineer as "compensation" for his "past work" for the airport authority "as well as for those services rendered during execution of the contract." J.A. 2420-21, 2423-24. The investigation also provided some corroboration that political influence was involved in the selection of the engineer. J.A. 2422, 2427-28. One member of the airport authority stated that it was "trying to give the appearance of ethical negotiations but was not." J.A. 2423. He further stated that "the final cost

would have been less if normal negotiations had been permitted to proceed as initiated." J.A. 2423. No action as a result of this investigation was taken by NSPE, by any of the state societies, or by anyone else so far as the record shows. J.A. 163, 5724.

Under any view of the facts or theory of law this situation surely warranted investigation. It cannot be evidence of a Sherman Act violation to investigate political influence, kickbacks and similar influences in the selection of professional consultants, or to express the view that bidding in the selection of engineers facilitates these abuses.

The government brief's reference to an alleged NSPE effort to frustrate an experimental Defense Department bidding scheme is similarly without foundation. That matter is detailed in NSPE's brief at 83-85 n.253, and *infra* at VI. In sum, NSPE did not frustrate the Defense Department experiment; the experiment was dropped before it was implemented *because Congress legislated against it.*

The government brief attempts to suggest, at 21 n.22, that NSPE engaged in other "enforcement activity." Contrary to that aspersion, review of each alleged instance of NSPE "enforcement" cited in the government brief shows that in *none* was any more involved than a statement to government officials regarding NSPE policy, and an explanation of the reasons for the policy. Nowhere in the record is there even a scintilla of evidence that NSPE has engaged in any coercive or covert practices or activities, or done anything other than advocate. Moreover, no person has ever been expelled from or in any way disciplined by NSPE for engaging in competitive bidding. F.D. 36, J.A. 9968-69.

That NSPE does not engage in "enforcement" is corroborated by the testimony of every practicing engineer

in this litigation. Each testified that he refused to engage in soliciting business by bidding as a matter of principle and because it is unfair to the client and dangerous to the public, and not because of NSPE or the NSPE Code of Ethics. See J.A. 175-81, 183-84 (Louis Bacon); 382-84, 394-99 (Joseph Lawler); 690-94, 838 (James Shivler); 929-69 (J. Neils Thompson); 1247-57 (George M. White); 1282-83, 1379-83 (William R. Gibbs); 1696-98, 1706, 1724 (James L. Polk); 1997-99, 2003 (Donald E. Marlowe); 1672-73 (John G. Dillon).

Thus, the record shows that NSPE does—as it stated in its answer to the complaint, as it has admitted throughout this litigation, and as it is doing in its briefs—advocate, explain and exhort the ethical principle. The record shows nothing more than this. NSPE's position, like that of the eminent engineers who testified, is a principled position based on the facts and considerations detailed in its brief. If these activities of a professional society are illegal, then the Court's statement in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, at 761-62 (1976) is meaningless—and the First Amendment signifies much less than this Court has proclaimed. See NSPE Br. 82.

E. The Traditional Method Of Selecting An Engineer Fosters Real Competition.

The government brief asserts repeatedly that the prohibition of bidding for engineering design work eliminates competition. The government's assertion is based on unexamined dogma, not the facts of this case. The evidence in the record, to which the government brief and the lower courts made no reference, holds that the traditional method, far from eliminating competition, makes competition possible, both in the procurement of engineering design services and in construction bidding. The evidence establishing these facts is summarized in

NSPE's brief at 8-35. For example, there is substantial and unrebutted evidence that bidding as a method of obtaining engineering design, far from being competitive, would raise barriers to competition, by reducing the ability of small engineering firms and solo practitioners to compete with large, established engineering firms. See J.A. 1021-23, 1705-06, 2340-41, 3353, 3380.

There can be no competition between sellers when the prospective buyer must choose among them without knowing what they are offering. The evidence shows that bidding in the peculiar circumstances involved here is not a competitive procedure, but a lottery, where each bidder hopes he has the winning number. This is true because in the circumstances of this case the prospective client (the buyer) cannot know at the time bids are tendered what any bid represents—any more than the engineer can know what the engagement involves before he studies the problem, consults the client and proposes an approach to its solution. See NSPE Br. 8-21. The selection of engineers by bidding is a purely formal procedure which lacks substance, which substitutes for and prevents genuine competition among engineers, J.A. 1236-37; and which also frustrates effective competitive bidding at the far more expensive construction stage. These facts are not even mentioned in the government brief. See NSPE Br. 18-21.

IV. ON THE BASIS OF A RULE OF REASON ARGUMENT, THE GOVERNMENT BRIEF ILLOGICALLY URGES AFFIRMANCE OF A *PER SE* DECISION.

The government brief is founded on the fallacious premise that application of the rule of reason to this case requires affirmance of the *per se* decision below. The government brief's only three contentions are, first, that "The NSPE ban is not justified by the nature of engineering services" (Point IA); second, that "Price com-

petition [sic] for engineering services is feasible and practical" (Point IB); and third, that the judgment "does not violate NSPE's First Amendment rights . . . ." (Point II). G. Br. 31-35. The government brief claims that the first contention is established by *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), that the second contention is established by evidence and findings in this case, and that the third contention (considered *infra*, at VI) is established by the four corners of the judgment itself. *Id.*

Contrary to the government brief, there is no basis for deriving from the *Goldfarb* opinion any conclusion as to whether "the NSPE ban is . . . justified by the nature of engineering services." *Goldfarb* involved neither engineering nor ethics nor solicitation by bidding. *Goldfarb* involved only the question whether a mandatory minimum fee schedule was legal under the Sherman Act merely because it was employed by a professional group rather than a business group. The government's own brief as *amicus curiae* in *Goldfarb* stated, at 7, "The only question is whether the antitrust laws apply to the most commercial aspects of legal practice—the fixing of minimum fees." This Court's opinion in *Goldfarb* stated that "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act", and the Court made clear that it was intimating "no view on any other situation than the one with which we are confronted today." 421 U.S. at 788-89 n.17.

Thus, the government's first contention, that *Goldfarb* shows NSPE's ethical provision to be "not justified by the nature of engineering services", is wrong. See G. Br. 32-33. The reasons why the ethical canon *is* "justified by the nature of engineering services" are stated at pages 5-35 of NSPE's brief.

The government brief's second contention is also wrong. Contrary to statements throughout the government brief (*see, e.g.*, G. Br. 35, 39, 40, 48), there is not a single finding in this case that bidding in the engineering field is either "feasible" or "practical." Every time Congress has considered the question it has held bidding in engineering infeasible and impractical. See NSPE Br. 24-27, 61-65. The testimony of more than a dozen expert witnesses in this case that bidding is infeasible and impractical, and the same conclusion of virtually every government body and engineering client which has considered the question, prove that bidding to secure an engineering design engagement is a sham and ill-serves the public. The lower courts declined to consider this record evidence, and made no findings on the subject.

If, however, there *had* been findings below that fee bidding in engineering is "feasible" and "practical" as the government brief contends, *a fortiori* the judgment would have to be reversed, since the lower courts ruled that they would "not consider" these issues. 389 F. Supp. 1199, J.A. 9938; 404 F. Supp. 460-61, J.A. 9988-90; 555 F.2d 983, Cert. App. A-11 - A-12. If, as the government brief claims, the lower courts had found that fee bidding in engineering, "will not endanger public safety", then the judgment—which is based on *per se* theory excluding that matter from consideration—unquestionably must be reversed. *See, e.g., United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610 (1977). Similarly, if the lower courts held the ethical rule unreasonable because, as the government brief contends at 34 and 50-56, there are other adequate safeguards of public safety, the judgment must likewise be reversed, since the lower court decisions eschewed consideration of all public safety aspects of this case.

If, contrary to the government brief's contention, the lower courts did not consider the reasonableness of the

ethical provision, they plainly disregarded controlling precedents. See NSPE Br. 47-54; *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918); *Northern Pacific Railway* v. *United States*, 356 U.S. 1 (1958); *White Motor Co.* v. *United States*, 372 U.S. 253 (1963).

The government brief fails to distinguish any of the Sherman Act Section 1 decisions of this Court upon which NSPE relies. The government brief fails to distinguish the 1911 *Standard Oil* and *American Tobacco* decisions, the 1918 *Chicago Board of Trade* decision, the 1925 *Maple Flooring Mfrs.* decision, the 1963 *White Motor Co.* decision, the 1977 *Continental T.V.* decision, or any of the others. See NSPE Br. 45-54. The government brief also fails to rebut the common law authorities and Sherman Act legislative history which show three centuries of precedent supporting NSPE's position. *Id.* at 45-51.

The government brief's sole reference to the leading case of *Chicago Board of Trade* v. *United States*, *supra*, consists of a perfunctory footnote stating "that the alleged restriction" in that case "only peripherally affected price, and . . . in fact enhanced competition by assuring equal access to information necessary to rational decision making." G. Br. 47 n.39. Apparently, the government has changed its view of the facts in *Chicago Board of Trade*, which it argued quite differently when it briefed that case in this Court. The government brief in *Chicago Board of Trade* is radically inconsistent with its present description of that case. The government brief in *Chicago Board of Trade*, at 9, just like the government brief here, charges price fixing and restraint of trade "within the narrowest definition of the term", but argues unreasonableness. Every single argument the government makes here was made by the government and rejected by this Court in *Chicago Board of Trade*, 60 years ago. For the Court's convenience, the government brief in

Chicago Board of Trade is submitted as an addendum hereto. Review of that brief will demonstrate to this Court that the government contended in *Chicago Board of Trade*, as it does here, that the restriction on bidding involved was price fixing which could not be justified as a matter of fact or law.

We agree with the government's current characterization—that *Chicago Board of Trade* involved an arrangement which "enhanced competition by assuring equal access to information necessary to rational decision making." The principle attacked here does exactly the same thing. We disagree with the contrary characterization the government made when it briefed that case, just as we disagree with the government brief's mischaracterization of the provision involved in the instant case. See NSPE Br. 10-15, 18-21.

NSPE submits, as it has continuously in this case, that *Chicago Board of Trade* is controlling here. Affirmance of the *per se* judgment in this case would produce the unseemly result that an agreement among 1600 commodity brokers not to bid, in order to preserve an orderly market, is measured by the rule of reason; whereas professional ethics against bidding in engineering, which are defended on the ground of imperative public safety considerations, are *per se* illegal.

Moreover, the government brief completely misapprehends the significance of this Court's decision in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 97 S.Ct. 2549 (1977). The government brief merely asserts, at 39 n.33, the innocuous proposition that *Continental T.V.* "did not undermine the rule that price-fixing . . . is illegal *per se*." What the government brief fails to distinguish, controvert or mention, however, is this Court's statement in *Continental T.V.* that the rule of reason in antitrust, not the *per se* rule, continues to be "the prevailing standard

of analysis." 97 S.Ct. 2557. See NSPE Br. 45-54. Where, as here, even the government brief argues the issue of reasonableness, there is no basis in the decisions of this Court—and the government brief cites none—to apply *per se*.

The fact that the government brief argues affirmance of a *per se* decision on the basis of rule of reason contentions is also demonstrated by the final note in the government brief's antitrust section, note 47 at page 56. There, the government asserts that NSPE is free to submit a modified ethical provision on bidding to the District Court for approval. Does the government ask this Court to hold that a litigant is entitled to a hearing on the reasonableness of its conduct after, but not before, entry of judgment? If, as the government contends, the principle at issue is *per se* illegal, how can NSPE obtain a judicial ruling that another statement of it is reasonable and hence lawful? If, as the government brief now contends, NSPE is free to promulgate a differently-worded ethical rule, why has the Antitrust Division for five years refused NSPE's request to negotiate such modification? Why has the government waited until its Supreme Court brief to argue the issue of reasonableness?

V. THE GOVERNMENT BRIEF MISSTATES THE ISSUES.

The government brief, at 2, misstates the questions presented. The antitrust issue here is not "Whether a comprehensive [sic] ban on competitive price bidding for engineering services collectively agreed to and enforced [sic] by the National Society of Professional Engineers, violates Section 1 of the Sherman Act." Nor is the constitutional issue "Whether the judgment of the district court, enjoining the Society from taking actions or making statements *that would have the effect of perpetuating its unlawful ban on competitive price bidding*

for engineering services, is consistent with the First Amendment." (Emphasis added.) Contrary to the government's polemic, the record evidence, which the lower courts expressly refused to consider, and which none of the lower court opinions discussed, establishes that: (1) the ethical provision is *not* "comprehensive"—but rather applies only where public safety is directly at risk; (2) bidding for engineering design services before the facts can be known is not "competitive", but is a mere form, a sham, and inherently deceives clients; (3) NSPE has *not* "enforced" the provision or expelled or in any manner disciplined anyone for violating it; NSPE has, as a matter of principle, exhorted engineers, government and private clients to abjure the dangerous and unethical practice of bidding before the facts can be known; and (4) the judgment does *not* enjoin the "perpetuation of [an] unlawful" arrangement, but rather enjoins expression, advocacy, association and publication of a long-held ethical belief embraced by reputable engineers and engineering clients throughout the United States, including the government. See NSPE Br. 5-35.

VI. THE GOVERNMENT BRIEF FAILS TO MEET THE DEMONSTRATION THAT THE JUDGMENT ABRIDGES FIRST AMENDMENT RIGHTS.

The government brief neither distinguishes nor discusses the authorities cited in NSPE's brief, at 80-91, all of which support the view that the judgment in this case violates the First Amendment. Instead, the government brief asserts, at 58, that the judgment "does no more than is necessary." However, contrary to the District Judge's view, and contrary to the government's continuing view, the issue is not how much prior restraint on speech, association and publication the government contends is "necessary", but whether the judiciary should independently consider if the Constitution permits a de-

cree this broad on the facts of this case, or on any facts. Contray to the government brief at 56-57 n.48, the district court has continuously declined NSPE's requests that it review the scope of the judgment. See NSPE Br. 38-39, 77. The circuit court, too, did not scrutinize the judgment in light of the facts, but upheld most of it, wholly under the authority of three cases which, as NSPE's brief shows at 86-88, stand for a different proposition than that for which the circuit court cited them.

As NSPE's brief notes, at 38-39 and 77, the District Judge stated to counsel that the judgment contained unnecessary provisions, and went too far. When the government attorney refused to accede to any modification, the District Judge entered the judgment precisely as presented to him by the government attorney. The District Judge stated that the prevailing party is entitled to the form of judgment it wants. The government brief does not, and cannot, controvert these facts. Indeed, counsel for NSPE presented several alternative forms of judgment to the District Judge, each containing remedial provisions, but these were rejected by the government attorney out of hand, and the District Judge gave them only a few moments' attention.

Thus, the delegation by the District Judge of the judgment-drafting function to the prevailing party produced the unconstitutionally overbroad product now before this Court. This Court's statement in *Milk Wagon Drivers Local 753* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 296 (1941), applies:

> In the exceptional cases warranting restraint upon normally free conduct, the restraint ought to be defined by clear and guarded language. According to the best practice, a judge himself should draw the specific terms of such restraint and not rely on drafts submitted by the parties.

This Court has stated that it will scrutinize painstakingly judgments not "drawn with the insight of a disinterested mind", but which were adopted verbatim from a litigant's submission. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964); *see also United States* v. *Ward Baking Co.*, 376 U.S. 324, 330-31 (1964); *Associated Press* v. *United States*, 326 U.S. 1, 22 (1945); NSPE Br. 59 n.210. The Court has "freely modified decrees in Sherman Act Cases", *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185 (1944); *Hartford-Empire Co.* v. *United States*, 324 U.S. 570 (1945), and not infrequently has reviewed such decrees paragraph-by-paragraph, *e.g.*, *United States* v. *United States Gypsum Co.*, 340 U.S. 76 (1950); *United States* v. *National Lead Co.*, 332 U.S. 319 (1947). Such review is particularly appropriate where, as here, the district court purported to effectuate this Court's mandate. *United States* v. *E.I. DuPont de Nemours & Co.*, 366 U.S. 316, 323 (1961). See NSPE Br. 77-91.

As NSPE's brief details, at 79-80, and the government brief does not deny, the judgment restrains advocacy or endorsement by NSPE even of Supreme Court decisions and United States statutes on point. For example, the following statement is apparently prohibited by the judgment, although the statement is clearly correct and constitutionally protected:

> The Brooks Act (40 U.S.C .§§ 541-544) and other United States statutes and regulations prescribe the traditional method of procurement of engineering services for all branches of the federal government. Numerous state laws and regulations establish similar requirements. NSPE approves of and supports these laws and regulations. It is unethical for an engineer to solicit work by fee bidding from a federal or state government agency subject to such a law or legal requirement. If a government agency subject to such a legal requirement requests an en-

gineer to submit a fee bid, the engineer should inform the agency of the applicable law or regulation and request that the procedure be changed to comply with the statute or regulation. It is also proper for an engineer to advise prospective clients not subject to such laws or regulations of federal policy as stated in the Brooks Act and of the policy of states with similar laws or regulations, to explain the reasons underlying the procurement procedure required by such laws and regulations, and to request the prospective client to follow the procedure adopted by most government entities in this country.

The judgment in this case, which appears to prohibit even the foregoing endorsement of United States statutory policy, goes beyond any scope even arguably necessary to remedy a Sherman Act violation.

The government brief contends, at 60, that "Nothing in the judgment prevents NSPE and its members from attempting to influence governmental action." Ironically, however, the government brief argues, at 60 n.53, that the judgment itself is based on what the government brief asserts was an improper attempt to influence government action, relating to the Defense Department's 1970 bidding proposal. As the government's own exhibit shows, however, the government brief is dead wrong on the facts. See NSPE Br. 82 n.253. The reason the Defense Department did not proceed with its bidding experiment was *not*, as the government brief contends at 60 n.53, because of a "boycott" by NSPE or anyone else. The Defense Department terminated the experiment for the reason stated in its own memorandum, which the government offered into evidence:

MEMORANDUM

TO: Assistant Secretary of the Army
Installations and Logistics

Assistant Secretary of the Navy
Installations and Logistics

SUBJECT: Joint Review of A/E Contracting

Reference is made to my memorandum of 3 August 1970, same subject. This memorandum is to advise of the Congressional action relative to this matter. Section 604 of the FY 1971 Military Construction Authorization Bill, H.R. 17604, states that such contracting "unless specifically authorized by the Congress . . . should continue to be awarded in accordance with presently established procedures, customs, and practices."

The test proposal, therefore, which had been planned is consequently withdrawn.

/s/ Barry Shillito
Assistant Secretary of Defense
Installations and Logistics.

[J.A. 6072]

Thus, the government's own exhibit conclusively establishes that it was Congressional action forbidding the Defense Department scheme, and not NSPE action, which caused the Defense Department to withdraw the scheme before implementing it.

The judgment—by its express terms and by the construction for which the government brief appears to argue —would forbid NSPE to inform its members or the public of facts relating to professional engineering practice, and of the informed opinion of engineers concerning procurement practices that do and do not serve the public interest. These are social and political matters on which it is important that all, including those best informed, be

permitted to speak freely. Regardless of the ultimate conclusion as to propriety under the Sherman Act of specific acts, free speech, association, publication and discussion cannot constitutionally be throttled. If the judgment is permitted to stand in its present form the Sherman Act will be transformed into an instrument of ideological repression. See NSPE Br. 77-91.

VII. SELECTION OF ENGINEERS BY BIDDING ENDANGERS PUBLIC SAFETY.

The government brief argues, at 50-56, that selection of engineers by bidding (mischaracterized as "price competition" by the brief) will not endanger public safety. G. Br. 50-56. We have shown that this argument is irreconcilable with the basic premise of the government case and of the lower court decisions holding the principle *per se* illegal. The government brief's contention is also contrary to the record, and warrants response.

The government argument consists of several peripherally related points. The government brief asserts, at 50, that the exclusion of R&D projects from the principle's scope shows that NSPE is not concerned about safety. This totally disregards the plain reasoning of the NSPE position. The 1962 BER opinion originally holding the principle inapplicable to R&D stated that this was because R&D contracts were for prototypes rather than structures. This holding has stood unaltered since 1962, not 1972 as the government brief erroneously states. NSPE's reasoning was succinctly stated by Paul Robbins in testimony:

> R&D projects do not normally result in a product for the use of the public. It results in a prototype which will be extensively tested and determined and probably a greater concern given to it before it is ever released. The R&D ends before the public use. [J.A. 1790.]

The government brief then refers, at 51, to the "When-in-Rome" clause which for a two-year period from 1966 to 1968 sanctioned bidding in foreign countries, when required by those countries' laws or customs. NSPE has never contended that the bidding procedure is not as hazardous abroad as it is in this country. The "When-in-Rome" clause was an early effort to cope with the extremely difficult problem of doing business in foreign countries where morals, ethics and laws are quite different from our own. Even today practices regarded as unethical or illegal in this country are often engaged in abroad by businesses, citizens and governments. NSPE did, for a two-year period, sanction unsafe engineering practices in foreign countries which required such practices. What is notable, however, is that as early as 1968 NSPE dropped this clause and refused to approve overseas practices it regarded as unsafe. It is common knowledge that the United States Government itself has not been as sensitive as NSPE, and engages in practices, such as export quotas and minimum or "trigger" prices, which would be illegal restraint of trade if undertaken domestically. Some foreign countries permit or require membership in cartels, or require adherence to particular religious or political parties, or forbid free speech, or engage in other practices abhorrent to our legal system. The brief variance in standards between domestic and foreign practice reflected by the "When-in-Rome" clause proves only that NSPE reaffirmed, years before the complaint in this case, the imperative duty of American engineers to preserve public safety even in foreign countries which subordinate that value to mercantile considerations.

The government brief argues, at 51-52, that the safety consideration "proves too much" as it might "justify the elimination of price competition in large segments of our economy." This "slippery slope" argument is based on the semantic trap that the government brief has con-

structed by identifying "price competition" with bidding in engineering. As detailed in the NSPE brief and below, these are not the same.

It is indisputably clear that the ethical principle at issue in this case is entirely different than activity described in antitrust cases as "elimination of price competition." The principle, which is the same as the Brooks Act procedure, requires that each engineering project be separately negotiated between the client and the engineer with the fee freely determined by the client and engineer according to the demands of the particular project. The ethical principle relates to the time and manner of establishing a fee, not the amount of the fee. There is no valid analogy between this principle and an agreement among construction contractors or sub-contractors or manufacturers of drugs or cosmetics on a price for their services or goods. The only conceivable analogy to the principle involved here would be an agreement among construction contractors that they would consider it deceptive to bid on a construction project before the engineering design and plans had been disclosed.

The government brief's intimation that any agreement among contractors, sub-contractors or manufacturers based on protection of the public is *per se* illegal is clearly not the law. Many salutary agreements among businessmen establish safety standards for electrical equipment (certified by the familiar "UL" label) and other building materials. To our knowledge, it has never previously been suggested that such agreements are illegal *per se*, or that their legality can be determined without reference to the public safety considerations on which they purport to be based.

After arguing that the unethical practice does not endanger the public, the government brief argues, at 52, that "professional traditions" in engineering preserve public safety. The government brief utterly fails to

explicate how "professional traditions" will operate unless specified in ethical codes. The government brief merely asserts, at 52-53 n.42, that adequate safeguards are provided by generalized statements, such as section 2 of the NSPE Code, which broadly states that "The engineer will have proper regard for the safety, health, and welfare of the public. . . ." The view espoused in the government brief would emasculate professional ethics. It would confine them to general statements, or bromides, and would preclude the professions from contributing that which they are best qualified to contribute—specific statements of the proper course for professionals to follow in the special circumstances of each profession. Apart from that, the government brief's view is unsupportable. If engineers interpret their duty to protect public safety, as expressed in section 2 of the Code, to impose the same ethical course more specifically described in section 11 (c), the issues of this case would remain in exactly their present posture. A retreat into generalities will not advance the analysis of the case.

The government brief argues, at 54-55, that high professional standards in engineering are unnecessary because of state regulation and local building codes. This argument was specifically answered by Sprigg Duvall, whose wide, intimate and detailed knowledge of the actual operation of professional engineering was based on insuring more than 60 percent of the practicing engineers in this country. He had personally investigated or supervised the investigation of accidents and defects allegedly caused by engineering malpractice over a period of more than seventeen years, and he maintained and analyzed statistics on the subject. J.A. 976-87, 999-1001. Mr. Duvall was emphatic in declaring that professional ethics are "a much stronger force" in protecting the public interest than either registration laws or building codes, pointing out that many registration laws are not specific, and that building codes provide minimum standards and

are often outdated. J.A. 1067-68, 1028. In short, the government brief's argument makes about as much sense as arguing that the Sixth Commandment is a bad idea because we have statutes prohibiting homicide.

Finally, the government brief falsely asserts, at 55, that there is no evidence that bidding was a factor in the engineering accidents and defects identified in NSPE's brief. Massive record evidence demonstrates the connection between the bidding procedure and dangerous engineering. A few examples follow:

Mr. Duvall testified that: "We do not insure any [engineering] firms that do bid. As a matter of fact in construction management which is let's say usually a customary service for engineers and architects, we will be excluding from coverage for engineers and for architects any project which they do competitively bid as a construction manager." J.A. 1016. He said this was because the risk of poor quality work was too great on jobs awarded to A/Es by bidding. J.A. 1017. He testified he did not understand how engineers could bid their services, because their principal function was to determine the best solution to the owner's problem, and that until that had been done the engineer could not know his costs, and thus could not prepare adequate plans and specifications on the basis of bidding. J.A. 1025. Competent and adequate professional engineering services are very definitely related to public health and safety. This is shown by the collapse or other failure of structures resulting in bodily injury or death brought to Mr. Duvall's attention in claim reports. J.A. 1027-28. He then described a number of such accidents, which are identified in NSPE's brief, at 28-29. J.A. 1028-53. On cross-examination, he testified that most firms try to provide the best professional services they can, but that when there is an economic crunch, and income is not enough to cover the expense of doing a job, some firms downgrade the services

they provide, and frequently the result is professional liability claims. J.A. 1061. Mr. Duvall made it plain that extensive experience and investigation showed that engineers who did not engage in bidding had fewer liability claims against them than those who engaged in bidding or fee cutting. J.A. 1012-16.

Louis Bacon, head of a large Chicago engineering firm, J.A. 134-36, testified on cross-examination that bidding in selecting an engineer was against the public interest. He described a case where a company obtained its engineering services by bidding, and the result was a building whose structural members could not bear the necessary weight. Investigation showed that the building had originally been designed inadequately. J.A. 261-64.

Dr. Marlowe described in detail two cases where the quality of engineering design was adversely affected by bidding. J.A. 2003-05. On cross-examination he testified that one of these cases, involving a District of Columbia building in danger of collapsing, was investigated by the D.C. Board of Engineering Registration, that basic engineering errors were discovered involving inadequate columns, and that the engineer responsible explained that his negligence was due to his being pressed for time and money after securing the job by bidding. J.A. 2010-15.

William Gibbs, partner in a large Kansas City engineering firm, testified that his firm would not engage in bidding because bidding does not permit providing quality engineering service or protection of public health, welfare and safety. J.A. 1283. He said he had seen many examples of inadequate engineering that endangered public health and safety, in water treatment plants, sewage treatment plants, roads which failed under traffic loads and bridges which collapsed. Based on discussion with other engineers who knew the situation he believed that there is a connection between the inadequacy of the

engineering work and price bidding in soliciting or securing the work. J.A. 1283-86. On cross-examination Mr. Gibbs testified that he had personally observed the inadequacy of engineering work done by engineers who solicited work by bidding or fee cutting. J.A. 1321-27.

George M. White, Architect of the Capitol, who had many years experience as a practicing engineer, testified, based on experience, that bidding is an unreasonable method of selecting professional engineers, and would be detrimental to society in terms of health, safety and public welfare. J.A. 1230-36. The risks, he said, are that buildings may fall down and bridges collapse. The long run effects would be that the quality of engineering service will decline. This will adversely affect fire safety, structural integrity and water supplies. Over a period of years the detrimental effects will be "astronomical" and highly destructive of the society in which we live. J.A. 1252-57.

The testimony of these, and other, witnesses expresses the professional judgment of leading experts with the highest qualifications and years of experience in a specialized, technical field. The government brief seems to argue that there can be no evidence of a relationship between selection of engineers by bidding and public health and safety without eyewitness evidence identifying the particular engineer who engaged in bidding to get a job and then committed an observable blunder which he confessed was attributable to his soliciting the work by bidding. In addition to their direct personal observations, the experts who testified were well within the limits of permissible expert opinion evidence in drawing obvious conclusions from years of observation and practical experience informed and guided by thorough knowledge of the technical field. There is no contrary evidence.

The massive expert testimony in this case certainly warrants at least an inference in the mind of a reasonable man that there may be a serious danger to public health and safety. Even the prospect of an inference that a danger of such magnitude exists must prevent rational lawyers from deciding on the basis of *a priori* principles and abstract legal theories that the danger to the public health and safety cannot be considered by the law.

VIII. THE REASONABLENESS OF PROFESSIONAL ETHICS, WHICH ARE "THE CONSENSUS OF EXPERT OPINION AS TO THE NECESSITY OF SUCH STANDARDS", MUST BE CONSIDERED TO DO JUSTICE.

Perhaps the most basic defect of the government brief is that it fails to identify any prejudice to the government or the public which could result from application of the rule of reason in this or any similar Sherman Act attack upon professional ethics. This failure, we submit, was not inadvertent or by reason of lack of effort of government counsel; there simply is no such prejudice.

NSPE's brief, by contrast, is devoted primarily to a summary of record evidence demonstrating the public interest aspects of this case. The manifest prejudice to NSPE, and to the public, which would result from the *per se* standard's application here is that *per se* precludes judicial consideration of the evidence. Unless the engineering profession, its clients, the government and NSPE's brief are completely wrong, the public will needlessly suffer economic waste and be endangered as a direct consequence of the judgment the lower courts entered. The prejudice resulting from application of *per se* is profound.

Regardless of what standard of law is applied in this case, it cannot be denied that the principle attacked represents the clear "consensus of expert opinion as to the necessity of such standards." *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 612 (1935).

We have shown that the "consensus" involved in this case long preceded NSPE's formation, and is deeply ingrained both in engineering ethics and in law. We freely concede the possibility that any consensus of expert opinion can be wrong, or that a profession can go too far in pursuit of a laudable objective. For example, this Court in *Bates* v. *State Bar of Arizona*, 97 S.Ct. 2691 (1977), held the consensus of expert opinion in the legal profession wrong insofar as that consensus prohibited advertising the availability of certain routine, repetitive legal services. The Court did not, however, require "the baby . . . to be thrown out with the bath", *International Salt Co.* v. *United States*, 332 U.S. 392, 405 (Frankfurter, J., dissenting). To the contrary, in *Bates* the Court took pains to distinguish the "baby" from "the bath." It is exactly such analysis which the *per se* rule forbids.

Professions are not above the law, as this Court made clear in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). As the Court recognized in *Goldfarb*, however, considerations bearing on professional practice are not identical to mercantile considerations. A central problem professional ethics address is maintaining the service motive against the bias of profit making. J.A. 612-13. Another fundamental object of professional ethics is to prevent practitioners from making misleading representations to clients, which practitioners are peculiarly able to do by reason of the nature of the professional-client relationship. J.A. 617-21. It is axiomatic and essential that these characteristics of professional ethics restrict mercantile market forces. If professional ethics are to have a future role, the antitrust laws must recognize that there are differences between the marketplace standards of commercial selling and the standards of ethical professional-client relations.

Petitioner asks no favored treatment for the professions. Petitioner asks only that the legitimate interests

and needs of clients and the public be considered, in this case, in the light of reason.

CONCLUSION

For the reasons stated in the Brief for Petitioner and herein, the judgment below should be reversed, and judgment entered for Petitioner.

Respectfully submitted,

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January 11, 1978

ADDENDUM

In the Supreme Court of the United States

OCTOBER TERM, 1917.

No. 98.

BOARD OF TRADE OF THE CITY OF CHICAGO ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from a decree of the United States District Court for the Northern District of Illinois enjoining the Board of Trade of the City of Chicago, its officers, directors and members, in a suit by the United States under the Anti-Trust Law, 26 Stat., 209, c. 647, from giving effect to a certain provision of what is known as the "Call Rule," adopted by the Board in 1906.[1]

The rule in its entirety reads as follows:

> Sec. 33. A. The Board of Directors is hereby empowered to establish a public "Call" for

[1] *Subsequently* to the institution of this suit this rule was abrogated.

corn, oats, wheat and rye to arrive, to be held in the exchange room immediately after the close of the regular session of each business day.

B. Contracts may be made on the "Call" only in such articles and upon such terms as have been approved by the "Call" committee.

C. The "Call" shall be under the control and management of a committee consisting of five members appointed by the president with the approval of the Board of Directors.

D. Final bids on the "Call" less the regular commission charges for receiving and accounting for such property may be forwarded to dealers. It is the intent of this rule to provide for a public competitive market for the articles dealt in and that with such market all making of new prices by members of this association shall cease until the next business day.

E. Any transaction of members of this association made with intent to evade the provisions of this rule shall be deemed uncommercial conduct and upon conviction such members shall be suspended from the privileges of the association for such time as the Board of Directors may elect. (Pet., R. 5; Ans., R. 11.)

The Board maintains at Chicago a commercial exchange for dealings in grain, provisions, and other commodities. Its membership includes not only brokers and commission merchants, but proprietors of elevators, and millers, malsters, manufacturers of corn products, and others who buy and sell grain and provisions on their own account—more than 1,600 in all. (Canby, R. 19, 20.)

We borrow from the brief for appellants the following statement of the kinds of trading in which members of the Board engage:

> Grain, after it has reached Chicago and is either in cars or elevators, is extensively sold by sample and warehouse receipts. The rule in question does not relate to this kind of trading. (Rec., 111.)
>
> Another kind of trading (Rec., 10, 115) consists in the making of contracts of purchase and sale for delivery in a future month. The Board of Trade provides a space called a "pit," for each of the leading commodities so traded in, to which members desiring to trade for future delivery in such commodity resort. * * * The rule in question does not relate to this kind of trading.
>
> A third kind of trading—and the one to which the rule *does* apply—is the purchase and sale of grain "to arrive." This consists in sending out from Chicago daily bids for grain by members of this Board of Trade,—generally by mail, but occasionally by telegraph,—to grain dealers at country points within the grain section tributary to Chicago. The terms of such trading permit the shipment of the grain within a certain number of days—usually ten, but sometimes more. (Rec., 146.)
>
> These bids prescribe the time, within which the acceptance of the offer must be received in Chicago by the bidder, and this is usually before the opening of the market at 9:30 a. m. the next morning. (P. 3.)

The "Call" immediately follows the regular session [1] and lasts about half an hour, usually ending before 2 p.m. (R. 117, 139.) To all intents and purposes it is simply a prolongation of the regular session. (Nichols, R. 108.)

The witness Canby, president of the Board, described the operation of the "Call" as follows (R. 20):

> What is termed the "Call" was what you might call an auction. In other words, these prices were bids and offers. It was held during the early part of the afternoon, held at the close of the day's business in one corner of the Board of Trade. The caller had a stand and stood up and called the different grades of grain, and as he would call each grade he would ask for bids, and all the members that desired to send bids out in the country that afternoon to buy grain to arrive would bid on this call, and they could bid, every one bid any price they wanted to send out.

After the close of the "Call" trading proceeds as follows, as exemplified in the typical case of the Armour Grain Company:

> * * * the Armour Grain Company, after the Call was over, took the prices which were established on the Call and put our bids into the country on the basis of those prices. * * * We mailed those cards wherever the grain was; wherever we thought we could buy any grain we put the bids in. (Marcy, R. 91.[2])

[1] The regular session is from 9:30 a.m. to 1:15 p.m.; on Saturdays, from 9:30 a.m. to 12 n. (R., 11.)

[2] Other members testifying to the same effect were Stream, R. 99; Pierce, R. 100-101; Glaser, R. 101-102; Eckhardt, R. 114.

The points to which these bids were sent were located not only in Illinois, but in the grain-growing sections of other States tributary to the Chicago market—Ohio, Indiana, Missouri, Nebraska, Kansas, Iowa, North and South Dakota, Minnesota, Wisconsin. (Stream, R. 99; Marcy, R. 91; Pierce, R. 101; Eckhardt, R. 114.)

The provisions of sub-division D of the rule, reading—

> It is the intent of this rule to provide for a public competitive market for the articles dealt in and that with such market all making of new prices by members of this association shall cease until the next business day,

as construed and enforced by the Board, absolutely prohibits members from competing as to price in the purchase and sale of corn, oats, wheat and rye at these country points, for Chicago delivery (i.e., grain "to arrive"), in the interval between the close of the "Call" and the opening of the regular session on the next day, by requiring all to quote the same price, namely, the final bid on the "Call" less the regular commission. (R. 96, 99, 100-101.)

It is this provision only which the Government now assails.

The charge of the bill is that by adopting and enforcing this provision, the Board, its officers, directors and members became parties to a combination in restraint of trade in violation of the Anti-Trust Law. (R. 5-6.)

The answer, while admitting the adoption and enforcement of the provision and its effect substantially as above stated (R. 11), avers that the purpose was not to prevent competition or to control prices (R. 11), but (a) to promote the health, comfort and welfare of members "by restricting their hours of business" (R. 11, 13), and (b) to break up a monopoly in this branch of the grain trade alleged to have been acquired by four or five large warehousemen in Chicago (R. 12).

On motion of the Government the allegation of the last-mentioned purpose was stricken from the answer on the ground that even if true it constituted no defense. (R. 15, 16.)

After a hearing the District Court entered a decree sustaining the charge of the petition and enjoining the Board, its officers, directors and members, in substance, from continuing to observe or give effect to the assailed provision, and from adopting or observing any rule or regulation of like character. (R. 165-167.)

ARGUMENT.

I.

BY ADHERING TO THE RULE IN QUESTION THE BOARD, ITS OFFICERS, DIRECTORS, AND MEMBERS, BECAME PARTIES TO A COMBINATION TO FIX A UNIFORM PRICE FOR BIDS FOR GRAIN AT COUNTRY POINTS, FOR CHICAGO DELIVERY, BETWEEN THE CLOSE OF THE CALL AND THE OPENING OF THE REGULAR SESSION ON THE NEXT DAY, THEREBY DIRECTLY AND SUBSTANTIALLY RESTRICTING COMPETITION AND RESTRAINING TRADE AMONG THE STATES.

The intended effect of the assailed regulation is to bind members of the Board to bid a uniform price in purchasing grain at country points, for Chicago delivery, between the close of the "Call" and the opening of the regular session on the following day. (Appellants' Br., p. 9.)

As stated, the points at which grain was thus purchased were located part in Illinois and part in neighboring States (*supra*, p. 5). The regulation, therefore, operated upon interstate commerce.

The manner in which this regulation restricted competition amongst members of the Board is best set forth in their own words contrasting conditions before and after the adoption of the regulation.

George E. Marcy, president of the Armour Grain Company (R., 96):

> The effect of the rule was that whereas before its adoption there were offers sent out by this, that and the other man here in Chicago through the wheat producing territory after the Board of Trade closed on one day,

bids send out at whatever figure the bidder wanted to name, after this rule was adopted that figure was the last named highest figure before 'Change closed on that day, and he was limited to that.

John P. Stream (R., 99):

Prior to the adoption of that rule we, and others on the Board of Trade, would arrive at a figure that we thought we could afford to bid for grain to arrive, based on conditions existing at that time, and we would send out those bids broadcast, and these were transmitted to the various sellers and owners of grain in the country by means of cards and telegrams, almost every day; they were sent over the grain territory, Iowa, Illinois, sometimes Nebraska, and Missouri and Indiana, sometimes Kansas. After the rule was adopted in 1906 we had to follow the rule, and send out the prices as made by the Call on that day. There was no other price to submit to these various sellers between the close of the Call and the opening of the Board the next morning at 9:30.

Charles B. Pierce, of Bartlett, Frazier & Company (R., 100-101):

I am familiar with the manner in which grain is purchased to arrive, and was purchased, prior to the adoption of the Call rule. We bought grain under the same methods we always have, and that we did then, and now, that is, by giving bids over night by post card and by letter, or through the day by telephone

or telegraph, as the case may be. Whatever our judgment indicated as the price that we desired to purchase at, that price was transmitted over the country on postal cards and by telegraph, prior to the adoption of this rule. And after this rule was adopted in 1906 the price communicated on grain to arrive by postal cards and telegrams was determined by the price fixed at the call, on all bids that we sent out while the market was not in session between the adjournment of the Call meeting and the opening of the Board upon the following morning. *If our judgment dictated that a higher price should be paid than that fixed on the Call, we could not offer that price.* [Italics ours.]

The potency of members of the Board in the grain trade is reflexly shown by the primacy of the Board among grain markets of the world. "Chicago," said the witness Patten, "is the greatest grain market in the world. The whole world looks to Chicago for its prices." (R., 103.) The answer itself avers that the Board "is a great commercial center for the transaction of business in wheat, corn, oats, rye and other grain." (R., 10.)

An agreement between men occupying a position of such strength and influence in any branch of trade to fix the prices at which they shall buy or sell during an important part of the business day is an agreement in restraint of trade within the narrowest definition of the term.

As the Circuit Judges observed in *United States* v. *United States Steel Corporation*, 223 Fed., 55, 155—

> When individuals or corporations make distinct contracts with each other, either in the form of pools or other agreements, dividing territory, limiting output, or fixing prices, there can be no question about the illegality of such contracts.

Such agreements belong to the class described by the Chief Justice in the *Standard Oil Case*, 221 U.S., 1, 56, 59, as "in restraint of trade in the subjective sense"—agreements by which one "voluntarily and unreasonably restrains his right to carry on his trade or business"; or, in the language of Mr. Justice Holmes:

> They are contracts with a stranger to the contractor's business (although in some cases carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. (*Northern Securities Case*, 193 U. S., 197, 404.)

There is a complete analogy in principle between the present case and *Swift & Co.* v. *United States*, 196 U.S., 375, where it was held that an agreement of packers not to bid against each other in the purchase of cattle violates the Anti-Trust Law. The members of the Board of Trade agreed not to bid against each other in the purchase of grain at country points.

It is of no legal consequence that the restriction operates only during the afternoon. The afternoon is an important part of the business day, particularly in this branch of the grain trade. As defendants' witness Ray testified—

> You will find out in the country that a large percentage of the grain is bought in the afternoon, especially at this time of year and in December, when farmers have done lots of hard work all through the summer, and they became a little lazy like, get up late in the morning, and they hardly get to town to do business before about noon. (R., 128-129.)

Moreover, if such a restriction may be imposed in the afternoon, why may it not be imposed in the morning?

To the naive inquiry in appellants' brief (p. 19-20)—

> How can anyone affirm that the competition, *if delayed until the next morning*, will not be as keen, and result in as good prices, as if it took place in the preceding afternoon [italics ours],

we reply—

> It is not for the Board to ordain that owners of wheat at country points shall not have a competitive market in which to sell in the afternoon.

Counsel for the Board was at pains to bring out that a member desiring to buy wheat in the afternoon from an elevator *in Chicago* could do so without any restriction at all as to price; that the rule "did not in the slightest affect the price at which the owners

of wheat in elevators could sell." (R., 22, 23, 94, 111.)

This but emphasizes the illegality of the restriction.

Why make a difference between buying wheat in the afternoon from elevators *in Chicago* and buying wheat in the afternoon at country points for subsequent delivery in Chicago? Why should members be free to compete in the one case and restricted to one price in the other? Why should sellers of wheat *in Chicago* enjoy a competitive market in the afternoon while sellers of wheat at country points are denied one?

II.

THE CONTENTION THAT THE RULE WAS BENEFICIAL IN OPERATION.

It is claimed for the rule (a) that it "is nothing more than a rule limiting the trading hours of its members," with the object of promoting their health and comfort (Appellants' Br., pp. 15, 20, 26); (b) that by inducing more members to participate the rule has kept trading in grain "to arrive" from being monopolized by a few, as formerly (ibid., pp. 15, 17, 21); (c) that it has afforded those having grain to sell at country points a market in the interval between the close of business on the Board on one day and the opening on the next (ibid., pp. 16, 21); (d) that it has apprised such persons more promptly of the prevailing prices in the Chicago market (ibid., p. 21); (e) that it has enabled such persons to fulfill their

contracts by tendering grain arriving at Chicago on *any* railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer (ibid., pp. 16, 17, 21); (f) that it has enabled the grain merchants of Chicago to work upon a narrower margin of profit and thereby to pay more for grain and to sell cheaper, thus making the Chicago market more attractive to shippers and grain buyers (ibid., p. 21).

This is but another way of saying that good intentions and some good results can save the rule from illegality. Where, however, as here, the necessary effect of an agreement or combination is unduly to restrict competitive conditions, the purpose or intention of the parties is immaterial. Agreements or combinations producing that effect are prohibited by the Act of Congress; and on the most elementary principles a transaction which the law prohibits is not made lawful by an innocent motive or purpose. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 341; *Addyston Pipe Co.* v. *United States*, 175 U.S. 211, 234, 243; *Swift & Co.* v. *United States*, 196 U.S. 375, 396. The intent to violate the law implied from doing what the law prohibits renders immaterial every other intent, purpose, or motive. *Bishop, New Criminal Law*, sec. 343; *Holmes, The Common Law*, p. 52.

In *Thomsen* v. *Cayser*, 243 U.S. 66, after hearing "the good intention of the parties, and, it may be, some good results," once more put forward as a

defense under the Anti-Trust Law, this Court disposed of the contention in language which should be final:

> The argument that is employed to sustain the contention is one that has been addressed to this court in all of the cases and we may omit an extended consideration of it. It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial and not a detrimental agency of commerce.
>
> We have already seen that a combination is not excused because it was induced by good motives or produced good results, and yet such is the justification of defendants. (P. 86.)

It follows, that were the good intentions or good results claimed in this case conceded, it would make no difference.

For this reason the District Court was right in striking from the answer, as legally irrelevant, paragraph 6 averring that one purpose of the "Call Rule" was to break up an existing unlawful monopoly in trading in grain "to arrive."[1] Moreover, the law, Federal and States, provides remedies for monopolies and restraints of trade.

As a matter of fact, however, with a single exception, none of the benefits claimed is attributable to the particular provision of the rule which the Government is attacking, i.e., the price-fixing restriction.

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[1] The fact is that all the circumstances and conditions leading to the adoption of the rule were brought out by the defendants at the trial, and in no possible view, therefore, were they injured by the striking of paragraph 6 from their answer. (R., 107-108, 112, 143-144.)

Neither that nor any other provision of the rule limits the hours of trading. As stated by the witness Nichols, who was produced by defendants and described himself as "in a sense the father of the rule,"

> We amended the rule prohibiting trading after 1:15 and established an afternoon session which was called the "Call," beginning practically at 1:30 and running until midnight or 9:30 the next morning if the traders cared to stay. (R., 108.)

So far, therefore, from being a measure to protect the health and comfort of members by restricting the hours of trading, the rule really removed a restriction of that character already existing, only, however, to impose a restriction as to prices.

Again, there is no apparent relation between the price-fixing restriction and the increase in the number of members of the Board engaged in trading in grain "to arrive"; and no effort was made to show any.

Nor is there any relation between the price-fixing restriction and the creation of a market for those having grain to sell at country points in the interval between the close of business on the Board on one day and the opening on the next. That result was due to the practice, in no wise questioned, of sending out bids in the afternoon to country points.

It was due to that practice again, and obviously not to the price-fixing restriction, that sellers of grain at country points were more promptly informed of the prevailing prices in the Chicago market.

The privilege enjoyed by traders under the operation of the "Call Rule" of tendering in fulfillment of their contracts grain arriving at Chicago over *any* railroad instead of over the particular railroad designated by the buyer was due to a new form of contract. (R., 126, 138.) The price-fixing restriction had nothing to do with it.

The claim that the rule enabled the grain merchants of Chicago "to work upon a closer margin of profit" doubtless has reference to the supposed advantage of a fixed price. This is the one exception to the statement that all the benefits claimed for the rule are referable to some other provision than the one under attack. And here, of course, the answer is that however beneficial a fixed price might be according to the point of view of the Board, Congress has proceeded on a different economic theory.

It must be kept in mind, therefore, in reading of the alleged advantages of this rule as set forth in the brief for the Board and in the testimony of the witnesses introduced on its behalf, that in practically every instance the alleged advantage is in no way whatever dependent upon the only provision of the rule which the Government is now attacking, namely, the price-fixing restriction.

III.

THE CONTENTION THAT UNDER THE POWER TO MAKE REGULATIONS FOR THE CONDUCT OF ITS MEMBERS THE BOARD COULD PROHIBIT MEMBERS FROM TRADING AT ALL AFTER A CERTAIN HOUR OR WITH NON-MEMBERS, AND THAT THEREFORE IT COULD DO THAT WHICH IS LESS—PRESCRIBE THE PRICE AT WHICH MEMBERS MAY TRADE AFTER THE GIVEN HOUR OR WITH NON-MEMBERS.

Another defense is, that under the power to make regulations for the conduct of its members the Board could prohibit members from trading at all after a certain hour or with non-members, and that, therefore, it can do that which is less—prescribe the price at which members may trade after the given hour or with non-members. (Appellants' Br., p. 30.)

The proposition that the Board might lawfully have prohibited *all* trading by its members after a certain hour is mere assertion, unsupported either by reason or authority. It suggests a hypothetical case for decision in lieu of the one before the court. The assertion is based, apparently, on the circumstances that "banks prescribe and conform to shorter business hours than other branches of business," that "labor unions combine to shorten hours," that the Chicago Board of Trade itself has for years "maintained a rule confining future trading *in its exchange building or in its vicinity*[1] to less than four hours a day," and on the supposed analogy of various rules shown to be in vogue at other commercial exchanges. (Appellants' Br., 24-25, 30; R. 155, 159-163.)

It may be conceded that the instances cited support by analogy the right of the Board to regulate the duration of its sessions—to restrict trading on the

[1] Italics ours.

exchange within prescribed hours. But the present proposition goes much further. It asserts the right of the Board not only to say when the exchange shall close but to prohibit thereafter any trading whatever by members, whether on the floor of the exchange or elsewhere. This transcends any reasonable regulation of the conduct of members.

Almost without exception the supposedly analogous rules of other exchanges relate to the conduct of members *in and about the exchange halls*—a very different thing from prohibiting members from trading altogether after the closing of the exchange. In the few instances where they might superficially appear to prohibit trading generally after exchange hours it is not clear in the absence from the record of any authoritative exposition of the rules that they really had that effect or were intended to do more than to prohibit public trading by members, after the prescribed hours, in or about the exchange halls.[1]

[1] Thus the rule of the Chicago Board of Trade respecting future trading (R. 155) does not absolutely prohibit such trading outside exchange hours, but merely prohibits future trading in the exchange hall or its vicinity. (*Supra*, p. 17.)

The rule of the New York Cotton Exchange limiting hours of trading has reference on its face to trading "*on the floor of the exchange.*" (R. 160.)

The similar rule of the New York Coffee Exchange prohibits trading after hours "*in exchange or its vicinity.*" (R. 161.)

The rule of the New York Stock Exchange restricting hours of trading (R. 159-160) refers to dealings in the exchange, or publicly in its vicinity. While dealings in stocks "*publicly* outside of the exchange, in any place" are stated to be in contravention of the purpose and intent of the rule, the context would indicate that this is only in the sense that contracts so made are not recognized or enforced by the governing committee of the exchange.

The rule of the Consolidated Stock Exchange of New York prohibiting transactions in any of the securities dealt in on the exchange before or after exchange hours "in the rooms of the association *or elsewhere*" is qualified by the statement that "this is to apply to trading *outside of the railing, in the corridors of the exchange, and on the street in the vicinity of the exchange.*" (R. 161.)

Nor does the proposition that the Board could prohibit altogether trading between members and non-members rest upon any stronger foundation. The case of *Anderson v. United States*, 171 U.S. 604, supports no such proposition. The question there, as stated by the Court, was "whether, without a violation of the Act of Congress, persons who are engaged in the *common business as yard traders* of buying cattle at the Kansas City stock yards * * * may agree among themselves that they will form an association for the better conduct of their business, and that they will not transact business with *other yard traders* who are not members." (171 U.S. 613-614.) [Italics ours.] Observe that the prohibition was against dealing with "other yard traders," i.e., others "engaged in the common business of buying cattle at the Kansas City stock yards." Giving the case its widest application it carries no suggestion that this exchange could have prohibited altogether trading in cattle between its members and persons who were not members; e. g., could have prohibited its members from buying cattle at country points for shipment to Kansas City. On the contrary, it was expressly stated in the opinion that the rule "has no tendency * * * to place any impediment or obstacle in the course of the commercial stream which flows into the Kansas City cattle market." (P. 619.)

Even, however, should this Court agree with the hypothetical premise that the Board could have pro-

hibited *all* trading by members after exchange hours, or *all* trading with non-members, it would still not follow that the Board, as a condition of withholding such prohibition, could *prescribe the prices* at which members should buy or sell. In the *Anderson Case*, upon which this branch of the defense rests, the Court laid especial emphasis upon the fact that the rule "has nothing whatever to do * * * with fixing the prices for which the cattle may be purchased or thereafter sold" (p. 614); that "this association does not meddle with prices" (p. 617).

The argument is similar to the one sometimes made that because individuals or corporations might abstain from commerce altogether they are therefore at liberty to say on what terms they will engage in it. Thus in *Thomsen* v. *Cayser*, *supra*, p. 13, 243 U.S. 66, it was urged in behalf of certain steamship lines that because they were volunteers in ocean shipping, free to go or come as they liked, therefore they might have withheld their service except on the illegal conditions they sought to impose. Mr. Justice McKenna answered the contention as follows (87-88):

> This can be said of any of the enterprises of capital and has been urged before to exempt them from regulation, even when engaged in business which is of public concern. The contention has long since been worn out and it is established that the conduct of property embarked in the public service is subject to the policies of the law.

IV.

THE CONTENTION THAT THE RESTRICTION OF COMPETITION CAUSED BY THE RULE WAS ONLY INCIDENTAL AND TOO SMALL TO BE TAKEN INTO ACCOUNT.

Again, it is said that the restriction of competition caused by the rule was only incidental and "too small to be taken into account."

There is doubtless a principle of *de minimis* in the Anti-Trust Law as elsewhere; but there is no room for its application here, either in respect to the nature and extent of the restriction imposed or with reference to the volume of commerce on which it operated. The short answer to the contention is that the restriction was not "incidental"; it was direct and deliberate—the defendants "intended to make the very combination and agreement which they in fact did make."[1]

The following statement from the opinion in the *Anderson Case* is relied upon:

> If for the purpose of enlarging the membership of the exchange, and of thus procuring the transaction of their business upon a proper and fair basis by all who are engaged therein, the defendants refuse to do business with those commission men who sell to or purchase from yard traders who are not members of the exchange, *the possible effect of such a course of conduct upon interstate commerce is quite remote, not intended and too small to be taken into account.* (171 U. S., 604, 618-619.) [Italics ours.]

[1] Addyston Pipe Case, 175 U.S. 211, 243.

This language refers to the remoteness of a merely possible effect *which was not intended.* It has no reference either to *intended* restraints or to *volume* of commerce affected.

Moreover, the restriction here, besides being direct and deliberately imposed, was drastic, not slight; it interposed an absolute barrier against free agency in price making at all times when the Board was not in session. The volume of business affected was also substantial. (R. 21.) The record shows that this trade in grain "to arrive" was a sufficiently attractive bone of contention among members of the Board to produce a condition which Vice-President Griffin, a witness for the defendants, described as bordering on "civil war" (R. 143). A branch of interstate commerce which was thus of enough magnitude and importance to call forth a special restraining rule of the Board, the largest grain market in the world, must be deemed of enough importance to call for the application of the countervailing rule of Congress declaring that interstate commerce shall be unrestrained.

Appellants seek to minimize the extent of their restraint on commerce by showing that the schedule of mail trains effective at Chicago interposed a practical limitation on dealings in grain to arrive after about 6 o'clock in the evening, and from this they argue that the restriction due to the rule prevailed only for "about two or three hours at the end of the business day" (Br., p. 9). A restraint of trade during part of the business day can not be justified, however,

by leaving it free during the remaining part. The law intends that it shall be free at all times.

In any event, however, the contention has no foundation in fact. The record shows that bids were sent to the country by telegraph and telephone as well as by mail. (R. 91, 114, 117.) These instrumentalities were available at all hours and it does not appear that they were on the whole used less than the postal facilities. The witness Hubbard, in extolling the advantages of the "Call Rule," testified that its effect in his business was to establish a market on commercial grades of grain *for practically the twenty-four hours of the day* (R. 123).

V.

THE CONTENTION THAT INTERSTATE COMMERCE IS NOT INVOLVED.

It is also urged that the decree should be reversed on the ground that the subject-matter upon which it operates is purely *intrastate* commerce because the contracts made for the purchase or sale of grain "to arrive" do not in terms *require* the grain to be shipped in interstate commerce. It is said that in order "to make the transaction of sale interstate, the parties should contemplate, and their contract should require, the shipment of property from one State to another." (Appellant's Br., 31-33.)

The answer is twofold.

First. The transactions pursuant to the "Call Rule" actually were in large measure of interstate

character. Bids were sent out broadcast to persons outside of Illinois who were the owners and shippers of grain located in States other than Illinois, offering to purchase their grain "to arrive" at Chicago. The parties to the resulting contracts did contemplate the shipment of property from one State to another, and property was actually so shipped in the performance of the contracts. Therefore interstate commerce was directly involved as the subject-matter of this suit and the appellant's contention has no basis in fact.

Second. It makes no difference, however, whether particular contracts made pursuant to the "Call Rule" were or were not interstate transactions. Regardless of the character of the transactions, the "Call Rule" and the concerted action under it directly restrained an actual current of interstate commerce consisting of the grain moving from States other than Illinois to the Chicago market by precluding members of the Board of Trade from competing with each other in the purchase of such grain after exchange hours. *Loewe* v. *Lawlor*, 208 U.S. 274; *Temple Iron Co.* v. *United States* (*United States* v. *Reading Company*), 226 U.S. 324, 357-358.

The case is like *United States* v. *Patten* (*Cotton Corner Case*), 226 U.S. 525, 543-544, where a conspiracy to run a "corner" in cotton was held to be an unlawful restraint on the whole volume of interstate commerce in that commodity even though the restraining acts were not altogether, if at all, interstate transactions.

Ware & Leland v. *Mobile County*, 209 U.S. 405, and *Engel* v. *O'Malley*, 219 U.S. 128, are not in point. In the *Ware & Leland Case* the defendants were brokers who took orders in Alabama, and transmitted them by telegraph to points outside the State, for the purchase and sale of cotton on speculation. The contracts so negotiated did not require, nor did they ordinarily entail, the shipment of any cotton in interstate commerce, and it was accordingly held that the imposition of a license tax on the business of making the contracts did not obstruct or interfere with interstate commerce. In *Engel* v. *O'Malley* the contention was that the exaction of the license tax amounted to a restraint on the interstate transmission of funds. The Court held otherwise because the law "was passed for the purpose of regulating and safeguarding *the business of receiving deposits*, which precedes and is not to be confounded with the later transmission of money, although leading to it." (Mr. Justice Holmes, p. 139. Italics ours.)

Both cases go merely to the question whether certain state tax laws burdened or directly affected interstate commerce. It does not follow that a given transaction is outside the body of interstate commerce because the State taxing power may be permitted to operate upon it. As said in the *Swift Case*, 196 U.S. 375, 399-400:

> But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the States, but

depends upon whether the tax so far affects that commerce as to amount to a regulation of it. * * * But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States.

VI.

CONCERNING THE SCOPE OF THE DECREE.

Lastly, the claim is made that the decree[1] is too broad, first, because certain of its injunctive provisions are not in terms restricted in their operation to interstate commerce (Appellant's Br., 33), and second, because it "enjoins future acts of defendants respecting the fixing of prices, which acts are in no way similar to the rule in question." (Ibid., 6, 38-39.)

The first proposition is addressed specifically to paragraph 1, sub-paragraphs (a), (b) and (c). If

[1] The decree, paragraph 1, finds that the Board of Trade of the City of Chicago, its officers and directors, "by adopting, acting upon and enforcing" the Call rule became parties to a combination and conspiracy to restrain interstate trade and commerce in violation of the Sherman Law. It permanently enjoins the Board, its members, officers and directors named in the petition and their successors in office, agents, etc., "from carrying out or attempting to carry out the aforesaid combination or conspiracy, and from entering into any other like combination or conspiracy among themselves or one with another to restrain interstate or foreign trade or commerce in the articles corn, oats, wheat and rye or any of them, by means or devices similar to those herein specifically enjoined," and each and all are "permanently enjoined and restrained—

(*a*) From agreeing or acting together or one with another, expressly or impliedly, directly or indirectly, for the purpose or with the effect of maintaining a limited price or any price for the articles corn, oats, wheat and rye or any of them, which may be arrived at by virtue of a certain 'Call' rule [setting forth the rule].

(*b*) From enforcing, acting upon or hereafter adopting any similar rule, regulation, by-law or practice or agreeing or acting together or one with another, expressly or impliedly, directly or indirectly, for the purpose or with the effect of fixing or maintaining a price on the articles corn, oats, wheat or rye for any specified time or times.

(*c*) From enforcing, acting upon or hereafter adopting any rule, regulation, by-law or practice or agreeing or acting together or one with another, expressly or impliedly, directly or indirectly, to the effect that members of said Board of Trade of the City of Chicago shall fix offers or bids which may be made to dealers in the articles corn, oats, wheat or rye to arrive, which said offers or bids are to be made between the regular sessions of said Board of Trade of the City of Chicago." (R. 165-167.)

these were isolated from the language immediately preceding, there would be some merit in the contention that according to their terms they apply as well to intrastate as to interstate commerce. Taking the entire context, however, it is clear that the provisions have reference only to the latter. This objection, moreover, is raised now for the first time. It was not assigned as error.

On the proposition that the decree enjoins "future acts * * * in no way similar to the rule in question," it is enough to say that the decree, as appears on its face, merely enjoins the continuance of the combination found to exist, or any similar one, either by means of the "Call Rule" or by any like rule or device. This much was necessary to prevent the recurrence of the evil which the case disclosed. *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 308; *Swift & Company* v. *United States*, 196 U.S. 375, 400. It was said in the *Swift Case*, "Under the [Sherman] act it is the duty of the court, when applied to, to stop the

[unlawful] conduct" (p. 400). That is all the decree in this case did when it enjoined the defendants from entering into any agreement for the purpose or with the effect of "fixing or maintaining a price on the articles corn, oats, wheat or rye, for any specified time or times."

CONCLUSION.

The decree of the District Court should be affirmed.

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